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The Dignity of Legislation

Jeremy Waldron

Essay

THE DIGNITY OF LEGISLATION

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> Civil Society being a State of Peace, amongst those who are of it, from which the State of War is excluded by the Umpirage, which they have provided in their Legislative, for the ending all Differences, that may arise amongst any of them, 'tis in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This *is the Soul that gives Form, Life, and Unity* to the Commonwealth: From hence the several Members [of society] have their mutual Influence, Sympathy, and Connexion. . . . For the *Essence and Union of the Society* consisting in having one Will, the Legislative, when once established by the Majority, has the declaring, and as it were keeping of that Will.[1]

I doubt that anyone will say this about the 103rd Congress of the United States: "This is the Soul that gives Form, Life, and Unity to the Commonwealth."[2] And although I have been studying the *Two Treatises* for more than twenty years, I was surprised to find that this was John Locke's view. Indeed, I was taken aback when a student drew this passage to my attention,[3] because I had been presenting John

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1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 425 (Peter Laslett ed., Cambridge Univ. Press 1970) (3d ed. 1698) (Second Treatise ¶ 212).

2. *Id.*

3. The student is now Professor Jacqueline Stevens, of the University of Michigan's Political Science Department.

Locke as the great proponent of natural right and accordingly as a believer in limited legislatures, the father of modern constitutionalism, perhaps even as a precursor of the American tradition of allowing or encouraging the judicial review of legislation in the name of individual rights.

I was not wrong: Locke is all those things. He did set quite strict limits to what he called "the extent of the Legislative Power."[4] Though perhaps we should not refer to him as a precursor of judicial review. He was adamant that the Legislature ought to be "the Supreme Power" in every society, at least so long as government exists,[5] and he maintained that when "the *Legislative* act contrary to [its] trust," the proper remedy is revolution, not litigation.[6]

Still, the passage I quoted is a striking one, as is our neglect of it in legal and political philosophy. For it is remarkable that, in our philosophy of government, we spend much more time discussing the appropriate limits on legislation—and the moral and philosophical basis of those limits in the idea of individual rights—than we do discussing the nature and character of the legislative power itself and its importance for a self-governing society. We are so confident that John Locke shares our attitudes about constitutionalism and the separation of powers,[7] that very few Locke scholars, very few political philosophers of any complexion, have bothered to explore or consider or even criticize the claim made in the passage I quoted—*viz.*, that the institution which makes our laws, and the institution which resolves our ultimate differences in moral principle, ought to be one and the same, and that the institution which combines these functions thereby embodies our civic unity and our sense of mutual sympathy. "This"—the Legislature—"is the Soul that gives Form, Life, and Unity to the Commonwealth."[8]

I

Locke's hypothesis is a challenging one, but it is not the challenge I am going to take up in this Essay. Instead I want to draw attention to another feature of legislatures and legislation—a feature which

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4. LOCKE, *supra* note 1, at 373 (Second Treatise ¶ 134).

5. *Id.* at 385 (Second Treatise ¶ 150). "In all Cases, whilst the Government subsists, the *Legislative is the Supream Power.*" *Id.*

6. *Id.* at 385 (Second Treatise ¶ 149); *see also id.* at 430-32 (Second Treatise ¶¶ 221-22).

7. *See* Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327, 349 nn.21-22 (1990); *cf.* Jeremy Waldron, *Freeman's Defense of Judicial Review*, 13 LAW & PHIL. 27, 33 n.8 (1994).

8. LOCKE, *supra* note 1, at 425 (Second Treatise ¶ 212).

provides a sort of infrastructure or underpinning for Locke's idea, and which has also been systematically neglected, left beyond the pale of discussion, in modern legal philosophy.

Philosophy proceeds by making familiar facts seem strange to us. So consider this familiar fact: Everywhere in the modern world, legislatures are institutions which comprise hundreds of members, members who take their decisions collectively, and deal with one another formally as equals.[9]

If we think about this fact at all, we take it as an obvious feature of a legislature's democratic character, of its claim to be a representative institution. We should remember, however, that democratic credentials and theories of representation come in all shapes and sizes. A single elective ruler might have democratic credentials in virtue of having more popular support than any other candidate for his office. In this regard, one person might be regarded as the representative of the whole community: an elected President is an example. Alternatively, an assembly of several hundred men and women might have democratic credentials, not just in virtue of the fact that each of them won an election, but because taken together their diversity represents, along various dimensions, the diversity of the community at large. Their democratic credentials consist partly in the fact that when they talk to one another, different sections of society (different regions, different interests, different ethnic groups) can be taken, through their representation, to be talking to one another. In their plurality, they represent the larger plurality of the community—as opposed to the elective ruler who, in his or her singularity, represents at best the hegemony of a single view or faction among the people.

Taken to an extreme, the second model of representativeness is a pictorial one. As such, it has a respectable pedigree. John Adams wrote that a representative legislature "should be an exact portrait, in miniature, of the people at large."[10] James Wilson maintained, at the Constitutional Convention, that legislative proceedings ought to be a "faithful echo of the voices of the people,"[11]—of the *voices* plural, not just of a unitary *vox populi*. On this conception, a representative as-

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9. *Cf.* the definition of "legislatures" in THE BLACKWELL ENCYCLOPEDIA OF POLITICAL INSTITUTIONS 329 (Vernon Bogdanor ed., 1987) ("legislatures: Political institutions whose members are formally equal to one another, whose authority derives from a claim that the members are REPRESENTATIVES of the political community, and whose decisions are collectively made according to complex procedures.").

10. Letter from John Adams to John Penn, in IV WORKS OF JOHN ADAMS 205 (Boston 1852-65), *quoted in* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 60 (1972).

11. PITKIN, *supra* note 10, at 61.

sembly ought to be a sort of microcosm, mapping to scale the features and differences that the wider community exhibits:

> as the map represents mountains and valleys, lakes and rivers, forests and meadows, the legislative body, too, is to form again a condensation of the component parts of the People, as well as of the People as a whole, according to their actual relationships. . . . The value of each part is determined by its significance in the whole and for the whole.[12]

Obviously, there are limits on how far one can pursue this conception. It is not at all clear, for example, if we desire representation of this kind, that electoral competition is the best way of choosing representatives. Maybe random selection or statistical sampling would be preferable.[13]

Nevertheless, almost all modern legislatures claim their democratic credentials in virtue of their inherent plurality, and thus implicitly in terms of the second model of representativeness rather than the first. No doubt, we should qualify this by observing that subordinate legislation is often made by single individuals or by very small rule-making agencies. This, however, should not distract us: such individuals and agencies derive their authority from a sovereign legislature that comprises hundreds of members. To state the point more carefully, we can say that everywhere *sovereign* legislatures are assemblies rather than individuals. In almost every legal system, legislation bases its *final* authority as law on the fact that it is the product of (or its production has been authorized by) a large popular assembly.

This contrasts quite markedly with the other great institutions of government. The highest court in each system characteristically comprises a very small number of judges and the executive is often just one person or a small cabinet. Again, we should not be distracted by the fact that large numbers of people are organized hierarchically under these officials: inferior courts and their staffs; subordinate executive officers. What is remarkable about the legislature is that the apex or, if you like, the highest rung in its hierarchy is occupied by hundreds of persons, each of whom counts as the equal of each of the others so far as their final law-making authority is concerned. In legislation above all, particularly legislation at the highest level, we think it important that authority be plural, and that people be represented by *people* and not just by an individual person.

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12. *Id.* at 62. This description is taken from the eighteenth century Swiss legal theorist J.C. Bluntschli.

13. *See id.* at 73-75 and references cited therein.

I labor this point, to emphasize that the constitutional preference for legislative *assemblies* survives, despite a clear consensus in the canon of political philosophy that the size of a legislative body is an obstacle, rather than an advantage, to rational law-making. Part of that consensus is explained by a sense, originating in ancient prejudice but surfacing also in the Enlightenment, that the larger the legislative assembly the lower the average level of wisdom and knowledge among the law-makers. The views of the Marquis de Condorcet are typical. On the one hand, Condorcet proved arithmetically that majority-rule makes a group more likely to give correct answers to some question than the average member of the group; what is more, the greater the size of the group, the more likely it is that the majority answer is right, provided the average competence of the individual members of the group (the chances of each coming up with the right answer to the question before them) is greater than 0.5.[14] On the other hand, Condorcet also maintained that average individual competence tends independently to decline as group size increases (and then of course the arithmetic of majority decision works in the other direction):

> A very numerous assembly cannot be composed of very enlightened men. It is even probable that those comprising this assembly will on many matters combine great ignorance with many prejudices. Thus there will be a great number of questions on which the probability of the truth of each voter will be below 1/2. It follows that the more numerous the

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14. Suppose there are three voters—*V*, *W*, and *X*—voting independently, each with a 0.6 chance of being right about the question they are addressing. When *V* casts her vote, there is a 0.6 chance she is right and a 0.4 chance she is wrong. When *W* casts her vote, there is a 0.6 x 0.6 = 0.36 chance that a majority comprising at least *W* and *V* will be right, a 0.6 x 0.4 = 0.24 chance that *V* will be right and *W* wrong, and a 0.4 x 0.6 0.24 chance that *V* will be wrong and *W* right. (There is also a 0.16 chance that they are both wrong.) Now the third voter, *X*, casts her vote. If *V* got it right and *W* wrong, there is a 0.24 x 0.6 0.144 chance that a majority comprising only *V* and *X* will be right. And if *V* got it wrong and *W* right, there is the same chance (0.144) that a majority comprising only *W* and *X* will be right. The overall probability that a majority will be right then is 0.36 (VWX or VW) + 0.144 (VX) + 0.144 (WX) = 0.648, which is higher than the 0.6 individual competence we began with.

For a sense of the difference that an increase in group size can make, consider that if we add to the group two additional voters of the same individual competence (0.6), we get a competence of 0.68256 for the five members deciding by a majority. To get a group competence of higher than 0.9, we need only add an additional 36 members with individual competencies of 0.6. *See* Bernard Grofman & Scott Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 AM. POL. SCI. REV. 567, 571 (1988).

> assembly, the more it will be exposed to the risk of making false decisions.[15]

Even if the ignorance of the large group of legislators is not a problem, there is still a concern, exhibited for example by James Madison, about their susceptibility to passion and malign influence:

> [T]he more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. The people can never err more than in supposing that by multiplying their representatives beyond a certain limit they strengthen the barrier against the government of a few. Experience will forever admonish them that, on the contrary, *after securing a certain number for the purposes of safety, of local information, and of diffusive sympathy with the whole society,* they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic.[16]

The apprehension about oligarchy reflects, in part, a concern about the difficulty of large numbers of representatives coordinating sufficiently to produce laws that are coherent. René Descartes presented this as a problem of coordination over time, comparing legal systems which have grown up over generations unfavorably with those that were founded all at once according to a single master plan:

> I thought to myself that the peoples who . . . became civilized only gradually, making their laws only insofar as the harm done by crimes and quarrels forced them to do so, could not be as well organized as those who, from the moment at which they came together in association, observed the basic laws of some wise legislator. . . . I believe that, if Sparta greatly flourished in times past, it was not on account of the excellence of each of its laws taken individually, seeing that many were very strange and even contrary to good morals,

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15. CONDORCET: SELECTED WRITINGS 49 (Keith M. Baker ed., Bobbs-Merrill 1976) (1785). *See also* Symposium, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1324 (1989).

16. THE FEDERALIST No. 58, at 351 (James Madison) (Isaac Kramnick ed., 1987). I am grateful to Marshall Sanger for this reference. The whole discussion in THE FEDERALIST Nos. 55-58 is worth reading in this connection.

> but because, having been invented by one man only, they all tended towards the same end.[17]

The most common concern, however, is about the coordination of large numbers of members in a given legislative session. William Blackstone described the task of extracting a "system from the discordant opinions of more than five hundred counsellors" in a representative assembly as "Herculean."[18] And when Jean-Jacques Rousseau asked, in *The Social Contract,* "How can a blind multitude, which often does not know what it wills . . . carry out for itself so great and difficult an enterprise as a system of legislation?"[19] it was partly this difficulty of co-ordination that he had in mind. He addressed it with his image of "the law-giver" a mythic figure distinguished, in this context, as much by his singularity as by his "superior intelligence."[20]

A hundred years later, we hear echoes of the same concerns, now in English political theory. John Stuart Mill worried about the prospects of coherent legislation emerging when bills are "voted clause by clause in a miscellaneous assembly."[21] He argued in general that "[n]o body of men, unless organized or under command, is fit for action"[22]; and since legislative functions are as much matters of action as executive functions, he concluded that "a numerous assembly is as little fitted for the direct business of legislation as for that of administration."[23] Walter Bagehot wrote in similar fashion about the House of Commons: "Here are 658 persons, collected from all parts of England [sic], different in nature, different in interests, different in look and language."[24] How is something coherent supposed to emerge from the babel of their cross-cutting proposals and counter-proposals? There is a saying in England, Bagehot added, "'a big meeting never

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17. RENE DESCARTES, DISCOURSE ON METHOD 36 (F.E. Sutcliffe trans., Penguin Books 1968) (1637), *quoted*—though not with approval—*in* MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 9-10 (1987).

18. 3 W. BLACKSTONE, COMMENTARIES 267, *quoted in* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH CENTURY BRITAIN 61 (1989).

19. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT II. vi, at 37 (G.D.H. Cole trans., 1950) (1762).

20. *Id.* at 39.

21. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, ch. V, at 77 (Currin V. Shields ed., Bobbs-Merrill 1958) (3d ed. 1865). Mill continued: "The incongruity of such a mode of legislating would strike all minds, were it not that our laws are already, as to form and construction, such a chaos, that the confusion and contradiction seem incapable of being made greater by any addition to the mass." *Id.*

22. *Id.* at 71.

23. *Id.* at 76.

24. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 138 (Garland Publishing 1978) (1878).

does anything;' and yet we are governed by the House of Commons—by 'a big meeting.'"[25]

Nor have these concerns diminished in the twentieth century. On the contrary, empirical political science and public choice theory have raised our understanding of the difficulties of collective action to a new level. Interest group theorists see legislation as, at best, bargaining and deal-making between the representatives of more or less powerful private interests. The understanding afforded by public choice theory may be even less optimistic than that: a large body such as a legislature, making its decisions by voting, may not have enough collective rationality even to settle on a stable deal, let alone articulate the public interest. What emerges from the chaos of the legislative process may well be a matter of who controls the agenda or, even more arbitrarily, of where in the cycle of voting a "decision" happens to pop out.[26]

These conceptions are, in turn, offered as a scholarly basis for the very unattractive image of legislation that prevails in modern jurisprudence, particularly American jurisprudence.[27] It is an image that portrays legislative activity as deal-making, log-rolling, interest-pandering, pork-barrelling, horse-trading, and Arrovian cycling—as anything, in short, except principled political decision-making. We set this sort of thing up as our model of legislation partly in order to burnish, by contrast, the reputation of the common law,[28] and partly, no doubt, to lend credibility to our normative models of judicial review of legislation and thus silence misgivings about the undemocratic character of that review.[29]

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25. *Id.* at 139-40.

26. For an excellent overview, more balanced than most, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

27. *See, e.g.*, William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988).

28. This tactic is certainly not a new one. Compare the observations of William Blackstone, *cited in* LIEBERMAN, *supra* note 18, at 56. "For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament." *Id.*

29. Political scientists know better of course. Unlike law professors, they have the good grace to match a cynical model of legislating with an equally cynical model of appellate and Supreme Court adjudication. Part of what I am interested in doing in the larger project of which this Essay forms a part is to ask: What would it be like to develop, for the philosophy of law, a rosy picture of legislatures that matched in its normativity and, perhaps, in its naivete the picture of courts—"the forum of principle"—that we present in the more elevated moments of our constitutional jurisprudence? *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985).

Our theme in all this is the size of the modern legislature, the plurality—the sheer *numbers*—of persons that law-making involves. How could something which is so obviously a bad idea—in Bagehot's words law-making by a "big meeting"—have become so entrenched as a principle of constitutional organization? One response we might offer is to highlight the efforts that have, in fact, been made in most legislatures to limit the number of members who participate actively in the drafting and consideration of a given measure. Legislative proposals may come ready-drafted from the executive, as in Britain, and their passage controlled by the executive through the mechanisms of party discipline. Or consideration of a bill may be concentrated under the much more manageable auspices of a specialist congressional committee, as in the United States. But though these practices are certainly important, they do little to explain the continuing association of the *authority* of a statute *as law* with its emergence from an institution comprising hundreds of representatives who deal with one another as equals. The requirement that a bill be deliberated upon and passed by Congress or Parliament as a whole survives, not merely as a "dignified" charade (like Royal Assent in the United Kingdom),[30] but as something which is regarded as a matter of right by the representatives themselves and as crucial to the standing and authority of legislation in the community. Hard-headed political scientists might locate the real action in the executive, in the corridors of Congress, or in the committee system. But I have no doubt that if they were advising constitution-framers in an East European country, for example, on the appropriate body for making laws, they would urge the institution of something like a large parliamentary or congressional assembly. And that would not be understood as a quaint concession to anachronism, like urging them to adopt a constitutional monarchy. It would be seen as a matter of real importance. Somewhere in our tacit theory of the authority of legislation is a sense that discussion and validation by a large assembly of representatives is indispensable to the recognition of a general measure of principle or policy as law.

II

So far, I have drawn upon a broad variety of materials in what we might call political, legal, and constitutional theory. One would expect, however, some more specific and rigorous guidance on these matters from analytical jurisprudence, more narrowly conceived, par-

30. *See* BAGEHOT, *supra* note 24, for the contrast between "dignified" and "effective" elements in a constitution.

ticularly from positivist jurisprudence, which is reputed to regard deliberate law-making—the positing and enforcement of new measures to govern a community or to change its mode of governance—as the essence or paradigm of law. One would think that if anyone was to be interested in the character of modern legislatures, the positivists would be. In fact, they seem to be quite uninterested. Although positivist jurisprudence defines law in terms of its sources,[31] its detailed conceptions of the sources of law—of the institutions that actually make positive law—remain relatively undeveloped.

Certainly, it is important to most modern positivist theories that there be legislatures and legislation. H.L.A. Hart thought, for example, that the mark of a modern legal system is the community's capacity to deliberately change its rules through formalized procedures.[32] Hans Kelsen believed that the dynamic role of the *Grundnorm* contained "nothing but . . . the authorization of a norm-creating authority" and that in a modern legal order, "the creation . . . of general legal norms has the character of legislation."[33] But even on this the positivists are not unanimous. Joseph Raz, who coined the "sources thesis,"[34] has concentrated almost all his institutional attention on courts, arguing that "the existence of norm-creating institutions though characteristic of modern legal systems is not a necessary feature of all legal systems, though the existence of certain types of norm-applying institutions is."[35] Thus on the basis of a strictly theoretical possibility that a system of positive law might exist without a legislature, Raz deems any further account of legislation to be inessential for jurisprudence.

Beyond the bare recognition (by a few) of legislation as a source of law, what do legal positivists say about law-making institutions? H.L.A. Hart emphasized that legislatures need not be regarded on the Austinian model of "uncommanded commanders." A legislature, he argued, could not be seen as the originating source of all legal rules. Instead, we must say that a society has a legislature in virtue of the acceptance in that society of a secondary rule of recognition. We must understand, moreover, that such a rule may lay down procedural

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31. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 47-48 (1979). "A law has a source if its contents and existence can be determined without using moral arguments. . . . The sources of a law are those facts by virtue of which it is valid and which identify its content." *Id.*

32. H.L.A. HART, THE CONCEPT OF LAW 90-93 (1961).

33. HANS KELSEN, THE PURE THEORY OF LAW 196, 222 (1967).

34. JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 210-16 (2d ed. 1980).

35. RAZ, *supra* note 31, at 105; *see also id.* at 87-88.

and substantive norms in the course of qualifying that person or body to legislate. Now, whether there are such limitations, and if so what they amount to, is a question to be resolved sociologically on Hart's account—what rule of recognition is in fact accepted?—not logically on the basis of any general jurisprudence of sovereignty.[36] Hart himself used the notion that legislatures are constituted by rules to explain the possibility of composite legislatures (bicamerality, for example, and the procedures for assent/veto by a head of state) and the possibility of constitutional limits on legislative power, as in the United States.

What struck me, however, re-reading *The Concept of Law* in the context of this study, was that for Hart these things mattered mainly as possibilities. The jurisprudential task is to establish that there could be such constitutive secondary rules. Once that possibility was established, Hart seemed largely uninterested in the sort of body that the modern legislature was. He was personally comfortable using "the Queen-in-Parliament" as his paradigm. But once the possibilities just referred were granted, the other points he wanted to make about legislation—about the open texture of language,[37] and about the interplay between legislature and courts[38]—might as easily have been made with reference to "Rex." Hart has a reputation in America for being perhaps less interested in courts and in judicial reasoning than a legal philosopher ought to be. But it is fair to say that he spent much more time on the issue of who and how many among the political elite must accept the rule of recognition that constitutes and empowers the legislature, and what the consequences of dissensus in this group would be,[39] than he spent on the ramifications for jurisprudence of the fact that law-making as a unitary act must be constructed in parliamentary institutions out of a plurality of diverse legislators.

Hans Kelsen was only marginally more forthcoming. In his account, the idea of constitutive rules of legislative procedure is not just an abstract possibility: "Only in a domocratic legislation [sic] are regulations required that determine the legislative procedure, which here means: participation in the popular assembly or in the election of the parliament, the number of its members, the proceedings to pass resolutions."[40] I take that to mean the following: In a legislature

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36. HART, *supra* note 32, at 69, 144-48.

37. *Id.* at 121-32.

38. *Id.* at 138-44.

39. *Id.* at 59-60, 97-120.

40. KELSEN, *supra* note 33, at 225. I read "Only in a domocratic legislation" as "Only in a democratic legislature."

whose composition reflects electoral competition, each elected member will claim to be the equal of every other and to have a voice, a vote and perhaps a mandate that must be heard and registered as a matter of right. In that context, procedural rules will have an importance and urgency which they might not have in the consensus politics of an oligarchy, and which they certainly will not have in a legislative monarchy or dictatorship. However, although this point is certainly important as a matter of political theory, it was not one that Kelsen exploited in the rest of his jurisprudence.

In a way, this jurisprudential reticence is more than made up for by the wealth of empirical descriptions and models of the modern legislative process that have been developed in political science. As I have already noted, legal philosophers are not slow to draw on these, particularly if they present legislatures and legislation in a bad light. My point then is not that legislatures are suffering from overall academic neglect, but that, in jurisprudence at any rate, we have not bothered to develop any idealistic or normative picture of legislation. Our silence here is deafening compared to our philosophical loquacity on the subject of courts. There is nothing about legislatures or legislation in modern philosophical jurisprudence remotely comparable to the discussion of decision-making by judges. No one seems to have seen the need for an ideal type or theoretical model that would do for our understanding of legislation what, for example, Ronald Dworkin's "Hercules" purports to do for adjudicative reasoning.[41]

It may be thought that the reason is obvious: Judicial reasoning poses a special problem for jurisprudence in the way that the reasoning of legislators does not. Argument in a legislature is explicitly and unashamedly political. It is either the interplay of interests, or the direct clash of policy proposals and ideologies. Legislators do not need jurists to tell them how to argue. The processes by which courts reach their decisions, by contrast, are supposed to be special and distinctive, not directly political, but interpretative of already established political conclusions or expressive of some underlying spirit of legality. It is, therefore, a matter of some importance for jurisprudence to find out whether these claims about the special character of judicial reasoning can be sustained.

That point can be conceded, but still, jurisprudence needs an ideal theory of legislation. One has to be careful how one describes this need. The normative point of an ideal model of legislation would

41. *See* RONALD DWORKIN, LAW'S EMPIRE 239-40 (1986); RONALD DWORKIN; TAKING RIGHTS SERIOUSLY 105-30 (1977).

not necessarily be directed at legislators themselves, telling them how they ought to behave, what laws they ought to pass, what criteria they should use for the public good, how much attention they should pay to their constituents' interests as opposed to the interests of the community as a whole, and so on. The theory we need is one whose lessons would be directed at least as much to the legislators' audience—those to whom their laws are addressed and those by whom they are interpreted—as to the legislators themselves. In other words, we need a theory concerning the enactment of positive law that will have ramifications for how we ought to view such law: how it ought to be interpreted and what authority it should have in the community.

Think, for example, of the difficulties we have gotten into with the notion of legislative intention—the idea that in interpreting a statute we should go back and search the legislative record for guidance. Whether an appeal to legislative intent in the course of statutory interpretation is either possible or desirable depends in large part on the sort of institution a legislature is and on the way it acts when it performs its law-making function. Empirical considerations are no doubt relevant. What evidence of intentions shared by legislators emerges from the Congressional record or from other sources? To what extent do legislators actually pursue shared intentions when they legislate? Realistically, whose intentions get privileged (which legislator? which sub-group? insiders? freshmen? marginalized legislators? minor parties?) when appeals to legislative intent are made? These empirical questions are important. But we also need to approach the problem with a value-laden theory of what legislation by a large diverse body is supposed to be like, and in what its authority is supposed to consist. Offhand, it seems that authority is accorded to a law by its enactment; and since it is the text and not the good intentions of the bill's sponsors that are voted on by the legislature, those intentions have no greater authority than any other sentiments that may be expressed from time to time in the legislative process. I do not want to argue in the present Essay for any particular position on this issue,[42] but I do want to insist that we cannot address the issue of legislative intention properly unless we deploy a reasonably detailed model of those aspects of the structure, the deliberation, and the decision-making procedures of legislative institutions that are implicated in a sound theory of the basis of a statute's authority.

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42. *But see* Jeremy Waldron, *Legislative Intent and Unintentional Legislation*, *in* LAW AND INTERPRETATION (Andrei Marmor, ed.) (forthcoming).

In this regard, our jurisprudence is badly handicapped by a theory of legislation which assumes tacitly that the law maker is a single person. We talk about legislative intent as though the act of legislation could be understood using the same model of intentionality that we use to characterize individual action. And we do this despite our awareness that modern legislation is enacted by many people with quite radically varying states of mind and intention.[43] It is remarkable, for example, that the most recent philosophical defense of appealing to legislative intent makes its case on the basis of what it means for a person—*one person*—to have authority over another, and then seeks to establish a convention for adapting this view of intent to the problematic case of an authoritative body comprising hundreds of members.[44] One would have thought that the wiser strategy would be to *begin* by asking how a large number of people acting collectively can have authority, and then use one's answer to that question to guide one's approach to what are bound to be, on any account, difficult and controversial issues about legislative intent.[45]

I have argued that philosophers of law, in the positivist tradition, are largely indifferent to the composition of legislatures: They give the impression that we might as well treat the legislature on the model of a single individual, for all the difference that it makes to jurisprudence. In fairness, I should add that in the seminal works of modern positivism—Jeremy Bentham's work, for example, and John Austin's—one does find a gesture towards the idea (which of course was the political reality in contemporary England) that a legislature might be a large and numerous body. Bentham said neutrally that we identify a sovereign whenever we notice "any person *or assemblage of persons* to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person."[46] However, that phrase—"assemblage of persons"—was almost his only concession to the point. For the rest of his jurisprudence and in much of his polit-

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43. For a the critique of the intentionalist approach, see, for example, DWORKIN, LAW'S EMPIRE, *supra* note 41, at 317-21.

44. ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 113-23, 159-65 (1992); *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 23-105 (1986).

45. *See* Waldron, *supra* note 42.

46. JEREMY BENTHAM, OF LAWS IN GENERAL 18 (H.L.A. Hart ed., Athlone Press 1970) (1782) (emphasis added). Austin's language is similar: "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 116 (Robert Campbell ed., 1874) (Lecture VI).

ical philosophy, the sovereign was almost always referred to as "he."[47] In the *Introduction to the Principles of Morals and Legislation,* the implicit recipient of Bentham's advice almost always appears in the text as "the legislator," with no reference at all to the pluralistic possibility.

One way to read this is to see it as indicative *sub rosa* of a definite bias in political philosophy in favor of monarchy—whether in the form of the philosopher-king, the unitary sovereign, or the enlightened despot. Certainly, that is what one would conclude from associating the positivism of Bentham and Austin with that of Thomas Hobbes. For when Hobbes said "the Legislator is *he* . . . ,"[48] the pronoun was not at all neutral as to number, but reflective of his personal conviction that monarchy was by far the best form of government, among other reasons because "a Monarch cannot disagree with himselfe, out of envy, or interest; but an Assembly may; and that to such a height, as may produce a Civill Warre."[49] All the same, because Hobbes had no choice but to acknowledge that this "one thing alone I confesse in this whole book not to be demonstrated, but only probably stated,"[50] the strict logic of his position required him to repeat from time to time that, in theory at least, sovereignty might be vested "either in one Man, or in an Assembly of more than one."[51]

It would be wrong, however, to think of modern legal positivists as closet monarchists. Their persistence with the image of legislation as analogous to one man's act of will stems rather, I suspect, from an implicit belief that the structure and character of a legislature is largely uninteresting from the point of view of legal philosophy. Although, as I stated earlier, positivism defines law in terms of its sources, the property of *being a source of law* is, for the positivist, about the most interesting thing that can be said about a legislature, a legislator, or a legislative institution. Who cares whether a Parliament has one house or two, 435 seats or a hundred? We can treat it as a black box. What matters is that this is where laws come from, this is the agency by which they are posited, and that they have the status of law in virtue of this origin rather than in virtue of the moral character of their contents. Representing the legislature, at least stylistically, as

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47. I am not saying that Bentham was uninterested in legislative assemblies. On the contrary, he can claim to have founded the peculiar English obsession with the shape and furniture of legislative chambers—an obsession which, for example, surfaces again in the writings and speeches of Winston Churchill. *See* K.C. WHEARE, LEGISLATURES 7-13 (1963). But Bentham saw no consequences for jurisprudence in the assembly aspect of legislation.

48. THOMAS HOBBES, LEVIATHAN 185 (Richard Tuck ed., Cambridge 1991) (1651).

49. *Id.* at 132.

50. THOMAS HOBBES, DE CIVE 37 (Howard Warrender ed., Oxford 1983) (1651).

51. *See, e.g.*, HOBBES, *supra* note 48, at 120, 129, and 184.

though it had the character of a single author of the texts we call statutes is a logical representation of the singularity of the source *qua* source. It is not, I think, intended as a politically-loaded or wishful representation of the ideal character of the source-institution itself.

The point is connected, in a way, with what positivists do in modern analytical jurisprudence. They spend most of their time defending the general idea of the sources thesis against proponents of various forms of natural law. In that debate, what matters is the possibility that a community might confer the status and authority of law on certain norms by virtue of their institutional provenance. What matters is not one account of the institutional details versus another, but rather the abstract idea of institutional provenance as the basis of law's authority rather than substantive criteria of morality or justice. Once that abstract idea is established, the institutional focus shifts very quickly to the courts. This is because modern natural lawyers are much less interested these days in defending the proposition *lex iniusta non est lex* against the sources thesis,[52] than they are in arguing that the sources thesis cannot give an adequate account of what goes on in the courtroom.

III

There is one additional explanation for our neglect of the composition and processes of legislatures in modern legal philosophy. It has to do with the level of generality at which analytical jurisprudence defines its agenda. Its practitioners believe that there are important philosophical tasks to be performed at the level of *general* jurisprudence—that is, jurisprudence addressing the very ideas of law and legal system, apart from the peculiarities of particular jurisdictions.[53] From the perspective of general jurisprudence, the possibility that a legislature might consist of one person or many persons is a variable that is simply beneath notice. Because those who take this approach do not want general jurisprudence to confine itself to the study of democracies, for example, they hold that we should not build into our concept of legislation the premise that it is necessarily the product of

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52. *Cf.* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23-49 (1980).

53. We see this approach taken to an extreme in Joseph Raz's jurisprudence, where on the basis of the mere logical possibility that a legal system might exist without a legislature, Raz deems an investigation of legislatures to be philosophically inessential. *See* RAZ, *supra* note 34 and accompanying text. Raz takes a similar view about the relation between law and sanctions: since a legal system could exist without sanctions, the fact that all existing legal systems uphold their norms with rules and penalties is a mere contingency, and thus of limited philosophical interest. *Id.* at 175-86.

the many acting in a representative assembly. We want our philosophy of law, they will say, to tell us what is in common between legislation by a king in Saudi Arabia and legislation in the American Congress or the German *Bundestag*.

I suspect this quest for institutional neutrality in legal theory is largely misguided. Of course, if we stipulate a sufficiently high level of abstraction for our general jurisprudence, we will have no choice but to ignore the features that distinguish some sources of law from others. We might, for example, try to find a definition of positive law that blurred the distinction between statute and custom, or a definition of "source of law" that licensed no distinction between legislation by a parliament and judge-made law in a hard case. But after a while, the payoffs would begin to evaporate in the heady realms of such abstraction, and we would be overwhelmed by the distortions introduced by a theory that insisted one size fits all.

In fact, of course, the modern positivist notion of source-of-law is not institutionally neutral. One way of seeing this is to consider the difference that was made in jurisprudence when the paradigm of man-made law shifted from custom to legislation. Customs can be seen as immemorial, earthy, local, and conventional, inhabiting a region between habit, prescriptivity and consent that is only partially captured by modern notions such as the "internal aspect" of rules.[54] They need not be mindless artifacts of common behavior. On the contrary, jurists have always talked of customs being held, remembered, and in that sense posited in a community: "According to the ancients, a local custom is an establishment held and preserved in a country by the old wise men by agreement, and maintained according to the condition of the place as long as it is accepted and suffices."[55] What is more, customs may even be worked up into an articulated system, capable of intellectual coherence and relatively conscious growth; we all know that as part of the historical ideology of the common law, whether or not it corresponds to reality. For generations of jurists, particularly in Western Europe, custom was the soul of man-made law.

Now, there is a world of difference—marked by a century or two of savage disagreement among lawyers—between this jurisprudence of custom and a legal philosophy that identifies man-made law as typically the expression of a legislator's sovereign will. In a way that is perhaps difficult for us to grasp, the partisans of custom in the eight-

54. *See* HART, *supra* note 32, at 54-56, 83-88.

55. JEAN BOUTELLIER, SOMME RURALE (1603), *cited in* DONALD KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 104 (1990).

eenth and nineteenth centuries regarded legislation—by an enlightened despot, for example—as having much more in common with the scientistic "Natural Law" of the philosophers and the theologians than with the humble sublunar reality of the norms which generations of ordinary folk had posited for themselves in various countries. Legislation tended to be associated with reason and rational thinking, with the ability of one enlightened mind to cut through the accreted layers of local usage.[56] Where custom was inarticulate, legislation presented itself in shining formulas of principle. Where custom was irredeemably parochial, legislation might be the same everywhere—reason's common solution to common human problems. And where custom was consensual, legislation could be the coercive off-spring of sovereignty—not inherently oppressive, of course, but something that might have to be imposed on an ignorant people by one more enlightened than they.

There is no space to pursue this contrast any further in the present Essay.[57] But no one can have any doubt about which conception has triumphed in modern positivist jurisprudence—particularly legal positivism as it has developed out of the English school of Bentham and Austin. There is a massive difference—in substance, ethos and rhetoric—between a positivist jurisprudence dominated by an image of customary law and a positivist jurisprudence dominated by an image of legislator's law. The hegemony of the latter has perhaps retreated a little in Anglophone jurisprudence in the last thirty years. We are well aware of the attempts that were made, in behalf of the legislator model to subsume custom altogether—for example, in Bentham's definition of customary law as "a miscellaneous branch of statute law ill-expressed and ill-defined."[58] And we know, from Hart's work among others,[59] how to resist that assimilation. We are now not fooled by the alleged neutrality of the legislator model into inferring, from the fact that both custom and legislation count as positive law, that they are therefore both the product of someone's will.[60]

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56. *Cf.* PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 270 (1992) ("Rational authority has quite a different foundation [than traditional authority]. Instead of immemorial custom, whose origins are lost in mystery, some form of *enactment* is the font of legitimacy. Rationality calls for explicitness, coherence, predictability, and impersonality.").

57. See KELLEY, *supra* note 55, at 91-108 and 167-206, for a rich, detailed and nuanced account of the role of custom in European jurisprudence, from the twelfth to the seventeenth century.

58. BENTHAM, *supra* note 46, at 235.

59. HART, *supra* note 32, at 44-48, 77-96.

60. There is an excellent brief discussion of some differences in KELSEN, *supra* note 33, at 224-29.

In much the same way, I think we should be open to the possibility that there is a similar discrepancy, similarly relevant for jurisprudence but belied by the common term "legislation," between the positing of laws by one enlightened legislator and the law-generating activity of a large-scale representative assembly involving hundreds of members. We should certainly be alert to the consequences of continuing to use the rhetoric and ethos of a single-legislator model to describe a practice which is structurally quite different. It is different, for example, because it involves more than one person, and thus necessarily involves relations among persons in a way that single legislator models do not.[61] We should be particularly alert to this danger, since we know that the single-legislator model we are using—as our "neutral" model of legislation—is one that has already tried and failed to render reductively in its own image other diverse, and importantly diverse, sources of positive law.

IV

In the remainder of this Essay, I want to explore one way in which taking the composition of legislatures seriously might have important pay-offs for our understanding of statutes and of the way they present themselves to us in a modern legal system. I shall pursue a hunch about a connection between the diverse composition of legislatures and something which is sometimes referred to as the peculiar "textuality" of statutes.

Legal theorists have long been fascinated by the textual quality of law—by the fact that legal conundrums can often be expressed as problems about the meanings of words.[62] I doubt whether "the letter of the law" is an idea associated only with legislation; custom has its "letter" too, as it signifies its presence in well-worn, almost incantatory sayings. But legislation is the legal form in which emphasis on the words themselves—*ipsissima verba*—is most prominent in modern jurisprudence. A statute consists of an enacted form of words; and the

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61. Compare the criticisms of utilitarianism as a basis for political philosophy in JOHN RAWLS, A THEORY OF JUSTICE 28-29 (1971):

> There is no reason to suppose that the principles which should regulate an association of men is simply an extension of the principle of choice for one man. On the contrary: if we assume that the correct regulative principle for anything depends on the nature of that thing, and that the plurality of distinct persons with separate systems of ends is an essential feature of human societies, we should not expect the principles of social choice to be utilitarian.

62. *See, e.g.*, LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992); COSTAS DOUZINAS ET AL., POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW (1991).

problem of interpreting and applying a statute is usually presented as the semantic problem of bringing a given form of words into relation with persons, things and events in the world.

Atiyah and Robert Summers have remarked that one could imagine a legal system according "no particular respect to the verbal form in which legislative texts are cast, treating statutes simply as cases are treated in the common law system."[63] In fact, that is not how we treat statutes. We treat pieces of legislation as texts: We feel ourselves bound by and associate authority with the very words that the legislature produces to a much greater extent than we do in regard to other sources of law or, for that matter, other sources of authority. Unlike common law principles, for example, the standards embodied in statutes have canonical formulations: The rule that has been posited by the legislature is the rule expressed by the very words that are used in the bill that the legislature has passed.

This contrast between legislation and other sources of law may be misunderstood. There are aspects of textuality to almost all modern law. In a common law system, for example, there are authoritative renderings of the texts of judgments handed down by courts, including the statements of reasons offered by each judge. There are, in other words, official law reports, which effectively settle any dispute about what was said in giving judgment. Even so, in the common law tradition, what the judge said (in the sense of the exact words that were used) is not taken to be essential to the identity of whatever standard was laid down. A different judge may be thought to be following the same principle even though she uses different words; and when she does, there is no sense that the original wording is canonical and hers a revision or reinterpretation. The principle simply does not have a canonical expression.[64] Interpretive exercises in common law are thus not oriented towards a given form of words as they are in the case of statutes.[65]

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63. PATRICK S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 97 (1987).

64. *But see* KENT GREENWALT, LAW AND OBJECTIVITY 66 (1992), for a discussion of the idea of "overlapping" formulations.

65. This is not to be read as implying that the distinction between canonically-worded and non-canonically-worded standards corresponds to the distinction between "rules" and "principles" as in Ronald Dworkin's early jurisprudence. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 41, at 22-31. Dworkin's distinction turns, not on textual canonicity, but on the kind of normative force that different standards are conceived to have. *Id.*

Dworkin insists, moreover, that it is a mistake to suppose that even statutory rules have canonical formulations: "[I]t is a commonplace that lawyers will often misrepresent the rules that a statute enacted if they simply repeat the language that the statute used. Two lawyers might summarize the effect of a particular statute using different words . . . ; they

To say this is not to deny that statutes need interpretation or that the words of the enactment (and their "plain meaning") are often insufficient to determine the statute's application. The point is rather that, in the case of statutes, the problem of interpretation begins from a sense that there is "a single, definitive, linguistic formulation"[66] of the standard being considered—there are words there which may (or may not) actually have a plain meaning. In the case of other sources of law, hermeneutical difficulties get going on a somewhat different basis.

There are of course important differences between legal systems in this regard. Atiyah and Summers note that English judges "tend to adopt a more textual, literal approach, while American courts tend to take a more purposive and, therefore, substantive, approach" to statutes.[67] But it is possible to exaggerate these differences,[68] and in any case, the point is not that statutory language is treated with exactly the same respect the world over, but rather that it is treated, in every legal system, with somewhat more focused respect than the language used by other sources of law in the same legal system (including other textual sources of law).[69]

How, then, are we to explain the peculiar textuality of statutes? It is not enough simply to say that the legislature is an authoritative source of law, and that this is why its *ipsissima verba* must be respected. For we do not treat all authorities in this way—hanging, as it were, on their every word. My hunch is that the answer has to do with the sort

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might still both be saying the same thing." *Id.* at 76. Of course, even if this were true, i.e., that standards are constructed through interpretation, it may still be the case that the language used in the statute is canonical in regard to the process of interpretation in a way that the language used by other sources of law is not.

I doubt that Dworkin would deny this. His recent characterization of the judge's task in regard to legislation is as follows: "He [i.e., Hercules, the ideal judge] tries to show a piece of social history—the story of a democratically elected legislature enacting *a particular text* in particular circumstances—in the best light overall. . . ." DWORKIN, LAW'S EMPIRE, *supra* note 41, at 338 (emphasis added).

66. *See* Robert S. Summers, *Statutes and Contracts as Founts of Formal Reasoning, in* ESSAYS FOR PATRICK ATIYAH 71, 74 (Peter Cane and Jane Stapleton eds., 1991).

67. ATIYAH & SUMMERS, *supra* note 63, at 100-01.

68. Atiyah and Summers cite an observation by Judge Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807-08 (1983), to the effect that a judge "rarely starts his inquiry with the words of the statute, and often if the truth be told, he does not look at the words at all." Posner himself acknowledges that this is more accurate as a description of constitutional interpretation, and that it applies to legislation only in regard to statutes which have been around for a long time, which have accumulated a large body of case law around them, and which even in their original wording invoked common law concepts and traditions; for example, the Sherman Act. *Id.* at 808.

69. See, for example, the comparison between statutes and contracts in American law, in ATIYAH & SUMMERS, *supra* note 63, at 42.

of institution a legislature is: a large gathering of disparate individuals who purport to act collectively in the name of the whole community, but who can never be sure exactly what it is that they have settled on, as a collective body, except by reference to a given form of words in front of them. This is the argument that I want to develop.

V

I began with the familiar fact that everywhere legislatures consist of hundreds of members. These throngs of people do not simply assemble from time to time and vote on laws. It is surely part of our normative image of legislatures that they are bodies where deliberation takes place. Think back to the John Adams's idea outlined in Part I: A representative legislature "should be an exact portrait, in miniature, of the people at large,"[70] so that when the legislators talk to one another, different parts of society can be taken, through their representation, to be talking to one another.

The importance of deliberation was also emphasized by John Stuart Mill:

> Representative assemblies are often taunted by their enemies with being places of mere talk and *bavardage*. There has seldom been more misplaced derision. I know not how a representative assembly can more usefully employ itself than in talk, when the subject of talk is the great public interests of the country, and every sentence of it represents the opinion either of some important body of persons in the nation, or of an individual in whom some such body have reposed their confidence. A place where every interest and shade of opinion in the country can have its cause even passionately pleaded, in the face of the government and of all other interests and opinions can compel them to listen and either comply or state clearly why they do not, is in itself, if it answered no other purpose, one of the most important political institutions that can exist anywhere.[71]

But we saw earlier that Mill did not entertain a particularly rosy view of parliaments as places for action.[72] It is not clear that he regarded this business of "talking" as anything other than an expressive opportunity to vent a variety of grievances and complaints.

There is, however, an older tradition in political theory which assigns an important synthetic function to talking in the context of prac-

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70. PITKIN, *supra* note 10, and accompanying text.
71. MILL, *supra* note 21, at 82-83.
72. *See supra* note 21, and accompanying text.

tical deliberation. That tradition has its most explicit origin in the *Politics* of Aristotle. For, although Aristotle inclined to the view that the law-giver in an ideal society would be "the one best man,"[73] he conceded that

> There is this to be said for the Many. Each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass—collectively and as a body, although not individually—the quality of the few best. Feasts to which many contribute may excel those provided at one man's expense. In the same way, when there are many [who contribute to the process of deliberation], each can bring his share of goodness and moral prudence; and when all meet together the people may thus become something in the nature of a single person, who—as he has many feet, many hands, and many senses—may also have many qualities of character and intelligence. This is the reason why the Many are also better judges [than the few] of music and the writings of poets: some appreciate one part, some another, and all together appreciate all.[74]

What lies behind this is the idea that a number of individuals may bring a diversity of perspectives to bear on issues under consideration, and that they are capable of pooling these perspectives to come up with better decisions than any one of them could make on his own. That, after all, is why Aristotle took it as the mark of man's political nature that he was endowed with the faculty of speech.[75] Each can communicate to another experiences and insights that complement, complicate or qualify those that the other already possesses; and when this happens in the deliberations of an assembly, it enables the group as a whole to attain a degree of practical knowledge that surpasses even the coherently applied expertise of the one excellent legislator.

We may or may not buy Aristotle's view that the many can in this way come up with better results than the one. But the existence of diverse perspectives in the community and the helpfulness of bringing them to bear on proposed laws are surely important features in any account of why the task of legislating is entrusted to assemblies. I believe that these features in turn frame the way in which we should think about the deliberative process itself, and in particular how we

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73. THE POLITICS OF ARISTOTLE 141 (Ernest Barker trans., Oxford 1958) (bk. III, ch. xv, 1286a).

74. *Id.* at 123 (bk. III, ch. xi, 1281a-1281b) (passages in square brackets are the translator's interpolations.) *See also id.* at 141-42 (bk. III, ch. xv, 1286a).

75. *Id.* at 5-6 (bk. I, ch. ii, 1253a).

should regard the relatively high level of formality associated with debate and action in a legislative assembly.[76]

I said a moment ago that Aristotle's view about the wisdom of the multitude is connected intimately with his teaching that the mark of man's political nature is his capacity for reasoned speech. It is worth pausing at this point to notice a renewed emphasis on speech, discourse and conversation in political and legal theory, particularly in theory that has been influenced by the work of Jurgen Habermas.[77] Jurists influenced by Habermas have suggested, for example, that a commitment to the United States Constitution is "less a series of propositional utterances than a commitment to taking political conversation seriously. . . . [T]he Constitution is best understood as supportive of such conversations and requiring a government committed to their maintenance."[78] They suggest too that the authority of judicial decision-making is "sustained less by the perceived correctness of the result than by the coherence of the result, for coherence permits conversation, and it is ultimately a faith in our ability to converse morally that holds us together."[79]

Much of this is far-fetched in ways I cannot go into here—in its aestheticism, for example, or in its conception of discourse as an end in itself. But one point is particularly important for our purposes. There is a constant temptation in modern discourse-jurisprudence to take as an implicit procedural ideal the model of an informal intimate conversation among friends. Certainly, an informal conversation among friends has attractive features of equality, openness and mutual respect. But it also tends to be predicated upon the idea that participants share implicit understandings and that their interaction is oriented towards the avoidance of adversarial disagreement and the achievement of consensus. These, I think, are qualities which are

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76. In their discussion of the inherent formality of statute law, Atiyah and Summers neglect this aspect. *See supra* note 63, 96-114. They stress (i) its "rank formality" (i.e., priority over other forms of law), (ii) its "content formality" (i.e., tendency to embody arbitrary or conventional elements), (iii) its "mandatory formality" (i.e., the application of standards embodied in a statute is non-optional; it cannot be "distinguished" as case-law can), and (iv) its "interpretive or textual formality" (i.e., the identification of the law embodied in a statute with a canonical form of words). The aspect on which I am concentrating here may be regarded as a fifth dimension: (v) procedural formality. I shall argue in Part VI, *infra*, that (v) contributes considerably to our understanding of (iv).

77. *See especially* JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (1990).

78. SANFORD LEVINSON, CONSTITUTIONAL FAITH 193 (1988).

79. LIEF H. CARTER, CONTEMPORARY CONSTITUTIONAL LAW-MAKING: THE SUPREME COURT AND THE ART OF POLITICS 143 (1985).

quite misleading so far as our models of political deliberation are concerned.[80]

Suppose, then, that instead of a conversation among friends we were to take the following as our ideal type of legislative deliberation. A large number of persons have assembled in a hall as representatives from different parts of a diverse society. Let us suppose that it is a radically diverse society—so that the members of the assembly represent not only different interests and regions, but come from completely different backgrounds, ethnic and cultural, as well as whatever political differences divide them. Imagine, for example, the national legislature in India or some other vastly diverse modern state. The representatives may belong to various religious traditions; they may be familiar with quite different social forms; they may have disparate senses of what gives meaning to life. They may not even speak the same language. Perhaps there is a state language stipulated for their proceedings in the legislature; if so, we may think of it as a second language for most of them, and one that they must use carefully and hesitantly. Certainly, their presence together in the chamber attests to the fact that they share some sense of common purpose—though it may not be much more than a foreboding that any attempt to disentangle their diverse interests into more homogenous "nation"-states, each with a legislature of its own whose members really do understand each other, would be fraught with the most frightful dangers and difficulties.[81]

To the extent that such a body seeks to legislate on common problems, there is a need for the members to be able to talk to one another, so that each can contribute insights and perspectives that would otherwise be quite outside the experience of the other legislators. However, the very reasons that make this interaction desirable and necessary also make it quite unlikely that the members can proceed with their deliberations as though they were conducting an open-ended conversation among friends. They are not transparent to one another as friends are, and they do not have a great deal of common ground on which confidences could be shared, premises assumed, and nuances taken for granted. Indeed, the prospects for mutual misunderstanding and for talking at cross-purposes are greatly

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80. Even among friends, conversation may have to become more formal to the extent that it is purposive and action-directed rather than casual. I am grateful to Philip Selznick for this point.

81. See the discussion of Salman Rushdie's apprehensions about communitarian politics in India, *in* Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 792-93 (1992).

enhanced by the very features of their situation that make it important—on Aristotelian grounds—for them to talk to one another. These representatives cannot deal with one another in the way that members of a tightly-knit *gemeinschaft* or an "old-boy's network" are often thought to be able to deal with one another. They share very little beyond an overlapping sense of common problems, and the rather stiff and formal language that they address to one another in their debates about those problems. If any one of them says, in the rather cozy way that people have who share tacit understandings, "Come on, you know what I mean," the answer is as likely as not to be: "No, I don't know what you mean. You had better spell it out for me."

Of course this is an extreme example. The membership of the United States Congress is less diverse than this, and the British House of Commons is more homogenous still. There are reasons for dwelling on the more extreme model nonetheless.

First, as we have seen, the less diverse the body of representatives, the weaker the case for legislation by an assembly as opposed to legislation by a single representative individual. Both John Adams's case, the "microcosm" model, and the Aristotelian case for legislation by the multitude rely on the fact that different members will bring to the process differing perspectives and experiences.

Second, and more generally, exaggeration offers certain methodological advantages in ideal type analysis.[82] By highlighting the diversity associated with the sheer plurality of a modern legislature, the model I am framing may help us understand the challenges and techniques that come along with diversity, so far as deliberation and decision-making are concerned. True, in a more homogenous legislature, these concerns can be discounted *pro tanto*. There is, nevertheless, some theoretical advantage in using an exaggerated model to focus our attention on diversity among legislators, particularly when—as I shall argue—they offer a plausible basis for understanding certain features of modern legislation which are otherwise somewhat bewildering: for example, the high degree of formality associated both with legislative deliberations and with legislative outputs.

Third, there are normative reasons for taking this approach. We pride ourselves on having not only a diverse society, but a political philosophy—particularly liberal political philosophy—oriented specif-

82. *See* 1 MAX WEBER, ECONOMY AND SOCIETY 19-21 (Guenther Roth & Claus Wittich eds., Fischaff et al. trans., U. of Cal. Press 1978).

ically to the challenges and difficulties of that diversity.[83] Analytic jurisprudence should participate in that orientation, while in its philosophical assumptions about the sources of law, it should not err on the side of social homogeneity.[84] Even if the diversity which we actually face is somewhat less extreme, the liberal instinct is that we should not be counting on that. Indeed, it is an important criticism of recent communitarian theories that they implicitly presuppose and rely upon on a degree of cultural and ethical homogeneity to an extent that is really quite reckless in the circumstances of the modern world.

We should be careful, in other words, to avoid building in any premise of ethnic and cultural homogeneity as a prerequisite in our models of politics and legislation. The narrow and intolerant impulses of communitarianism, tribalism and nationalism are wreaking enough havoc in the world as it is, without the encouragement of liberal jurisprudence. If there is a conception of law that makes no such assumption—or that celebrates diversity or, at any rate, comes to terms with it—we should try to state that conception clearly and make it central in our jurisprudence if we can.

VI

We left our diverse legislators in their chamber, a little unsure of each other and a little tongue-tied. We might imagine that from time to time one of them will stand up and make a proposal to her fellow representatives. When she does, it may evoke a flurry of responses. Some she will recognize as opposing her idea; some will appear to misunderstand it. Others may put forward a different proposal or a counter-proposal, which in turn will evoke similarly confusing responses. Some members may stand up and make speeches on quite different matters. They may tell stories of tenuous or indeterminate relevance about the problems and experiences of their constituents. Others may interrupt by chanting slogans, singing hymns, telling jokes, or shouting threats. Matters that various members conceive as having great urgency will cut across one another. Responses to one idea will be taken as responses to a different idea, and no one will be able to keep track of where they have got to on any particular front.

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83. *See* especially JOHN RAWLS, POLITICAL LIBERALISM (1993). For a powerful argument that Rawlsian liberalism does not go far enough in addressing diversity and difference, see IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

84. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990).

In circumstances of this kind, we see the importance of deliberative formality, parliamentary procedures, and rules of order. It is clear from the scenario just outlined that an assembly like the one we are imagining needs to structure and order its deliberations if it is to achieve any of the advantages that the Aristotelian theory suggests may accrue from legislation by the many. The members of our assembly need to establish rules and procedures that address issues such as the following: How are debates initiated and how are they concluded? Who has the right to speak when, how often, and for how long? Who may interrupt, who may exact an answer to a question, who has a right of reply? How is a common sense of relevance maintained or how are members assured that they are not talking at cross purposes? What issues, subjects, or details may be addressed at various stages in the proceedings? How are topics for debate selected, how are subject-matter priorities set, and how is an agenda determined? How is the conduct and conclusion of a deliberative session related to the assembly's powers of resolution and action? How is debate brought to an end? How are decisions taken?

Blandly stated, these matters might seem obvious and beneath notice in jurisprudence. It is tempting to regard such procedural rules as arbitrary conventions, with no intrinsic philosophical significance of their own. That would be a mistake. Political scientists have noted the remarkable similarity in parliamentary procedures around the world.[85] There are no doubt historical reasons: for example, the global influence of the Westminster tradition, largely as a legacy of British imperialism. But the similarity can also be understood as a common human response to a similar set of problems: the circumstances of procedure, so to speak.[86] Wherever there is a felt need for common action as an upshot of deliberation in circumstances of diversity and disagreement, then needs of the kind outlined in the previous paragraph are bound to be felt.

VII

I have focused so far on what the ideal model of a diverse legislature contributes to our understanding of procedural formality in lawmaking. I now want to turn to the relative formality of legislation—i.e., statutes—considered as products of processes of this kind.

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85. *See, e.g.*, PHILIP LAUNDY, PARLIAMENTS IN THE MODERN WORLD 61 (1989).

86. *Cf.* RAWLS, *supra* note 61, at 126-30 (describing co-existence, mutual vulnerability, moderate scarcity, limited altruism, and ethical and religious diversity as "the circumstances of justice").

My hunch is that textual canonicity and the procedural formality discussed in the previous parts are connected. At first glance, however, there is no obvious reason that procedural formality should necessarily issue in output—or interpretive—formality. We might imagine a proclamation made by a legislator-monarch with all sorts of formal pomp and ceremony, and yet it might be understood that the purpose of the occasion's formality is to impress upon subjects the personal authority of the ruler rather than to evince any commitment on his part to the particular linguistic expressions that were used. Indeed, it might follow from the fact that the procedural pomp highlights the personal authority of the monarch, that we should orient our behavior to what we think he intended rather than the words he happened to say. In these circumstances, one might want to say, with Hobbes, that "it is not the Letter, but the Intendment, or Meaning . . . (which is the sense of the Legislator,) in which the nature of the Law consisteth."[87] By itself, then, procedural formality is not sufficient to make sense of output formality.

It is possible, however, to relate output formality to procedural formality, when the later is undertaken for certain reasons. Think back to the predicament of the radically diverse legislature we imagined in Part VI. The members of that body found it necessary to order their deliberations with formal rules governing the setting of an agenda, the initiation and conclusion of discussion, the right to speak, the structure of debate, and the basis of voting and decision-making. Those familiar with parliamentary procedure, whether in national legislatures or small-scale public meetings, will know that debating rules are largely oriented towards and ordered by the idea that at any given time there is a specified proposition under discussion. Even in the most basic forums, propositions are moved and seconded, and once a motion is on the table, the deliberative body has a specific form of words which is open for discussion, and the organizing principle of debate becomes (roughly) that all and only contributions to the consideration of that proposition are to be heard, until either the time set for debate runs out or until the question defined by that proposition has been resolved. This insistence that there be a formulated motion, and that speakers observe norms of relevance in regard to that motion, are the primary basis on which parliamentary procedure seeks to avoid the nightmare of people talking endlessly at cross-purposes and the failure to make the sort of contact with one another's contributions (synthetic or dialectic) that practical deliberation requires.

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87. HOBBES, *supra* note 48, at 190.

No doubt, in the course of discussion, someone may feel that it would be wiser for the assembly to discuss a somewhat different proposition than the one specified, perhaps worded in a subtly or substantially different way. But if they want to press the point, the parliamentary rule is that they must move an amendment, changing the wording of the motion under discussion, once again in a specifically formulated way. Proceedings are then devoted to a discussion of the virtues of the amendment, *qua* amendment, and a vote is taken on that, before the substantive discussion is resumed. And again, we see the virtue of this way of doing things in a diverse assembly. In conversation among friends, the topic may shift in an open-ended way, and people familiar with one another have both the willingness and the ability to keep track. But in an assembly consisting of people who are largely strangers to one another, deliberation would be hopeless if there was a sense that the topic might or might not have shifted slightly after every contribution. So, although amendment processes exist, their formulaic character and the rules governing their proposal and adoption provide a way of keeping track of where the discussion is, a way of keeping track which does not depend upon implicit understandings that some of the members may not share.

When discussion is exhausted, a vote may be called for, and—if my experience of law faculty meetings is any indication—someone will immediately leap to their feet and say: "I'm confused. What exactly are we voting on?" In a well-run assembly, the clerk or secretary will be in a position at that stage to read out the proposition (as amended) which now is the focus of the final vote. Once again, the determinacy of that proposition, as formulated and as amended, is important to establish a sense that we are all orienting our actions in voting to the same object. It is important for me to know, for example, that what I take myself to be voting against is exactly what my opponent takes himself to be voting in favor of. Otherwise, the idea that our votes, on a given occasion, are to be aggregated and weighed against one another becomes a nonsense.

What I have just described is rudimentary by comparison with the processes employed in actual legislative assemblies such as the Congress of the United States. Bills are longer and more complex than the sort of motions one hears at faculty meetings. They have usually been drafted—more or less competently—in advance, and there are many stages of deliberation (including committee stages, whose proceedings may be much less formal) that bills must go through before they are adopted. And, this is to say nothing of the vicissitudes of bicamerality, conference committees, and the rest.

For the most part, however, these complications enhance the need for a determinate text to focus and coordinate the various stages of the legislative process. Without a text to consider, to mark up, to amend, to confer about, and to vote upon, the process of law-making in a large and unwieldy assembly would have even a greater air of babel-like futility than that which is currently associated with Congress.

Thus, whether we are talking about a small-scale meeting or a large-scale legislative process, the positing of a formulated text as the resolution under discussion provides a focus for the ordering of deliberation at every stage. The existence of a verbalized bill, motion, or resolution is key to norms of relevance, and key to the sense, which procedural rules are supposed to provide, that participants' contributions are relevant to one another and that they are not talking at cross purposes. Maybe, a one-person deliberative body can do without this—though even there, many of us are familiar with the mnemonic virtues of a formulated proposition in our own solitary decision-making. And maybe, decision-making in a small group of oligarchs or in a junta of familiars can do without this as well, if they can move toward consensus on the basis of conversational informality. But the sense of a determinate focus for discussion—something whose existence is distinct from the will or tacit understandings of particular members[88]—seems absolutely indispensable for a large and diverse assembly of people whose knowledge and trust of one another is limited.

VIII

If there is anything to this hypothesis, then we might want to start thinking about the textual canonicity of legislation in a slightly different way. I said in Part I that one of the values most commonly associated in the modern world with legislation is democratic legitimacy: We should defer to statutes because they have been enacted by a democratically elected entity. Just as the idea of democracy is insufficient to explain why we prefer a large elected legislature to a single elected legislator, so the democratic principle is insufficient to explain the particular way in which authority is accorded to legislation in the mod-

88. Compare the characterization of the advantages of a written constitution in HANNAH ARENDT, ON REVOLUTION 156 (1965):

> [T]he Constitution [is] a written document, an endurable objective thing, which, to be sure, one could approach from many different angles and upon which one could impose many different interpretations, which one could change and amend in accordance with circumstances, but which nevertheless was never a subjective state of mind, like the will.

ern world, *viz.*, by taking seriously the exact words that were used in the formulations that emerged from the legislative chamber. If I am right, we now have an explanation for the importance of the *ipsissima verba* which is oriented primarily to the legislators' dealings among themselves, rather than directly to the issue of their collective authority vis-a-vis the people.

The final step, then, in pursuit of this hypothesis would be to show how this account of the *importance* of a text to the legislators is connected with the *authority* of the text for its intended audience. Here there are a couple of lines to pursue. First, as we have seen, the existence of orderly discussion is necessary to secure whatever Aristotelian advantages accrue from deliberation in a large and diverse group. Unless the diverse experiences and knowledge of the various legislators can connect and be synthesized, it is unlikely that their interaction will produce standards that are superior to those that any individual citizen could work out for herself. The conditions for orderly discussion, then, are indirectly conditions for the legislature's authority, in the Razian sense.[89] In other words, authority requires superior expertise; superior expertise comes from deliberation among those who are different from one another; deliberation among those who are different from one another is possible only on the basis of formal rules of order; and crucial to rules of order is the postulation of an agreed text as the focus of discussion.

Second, respect for statute law is partly a matter of respect for the legislature as a forum whose representativeness is an aspect of the fairness[90] of the way a community makes its decisions. To the extent that representativeness requires diversity in the assembly, respect for that fairness is a matter of respecting the conditions under which diverse representatives can deliberate coherently. Thus, fairness-based respect for the legislature as a body may require not only that we respect the standards which it posits, but also that we respect these more formal aspects of the way in which its posited standards are arrived at—

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89. *See* RAZ, *supra* note 44. Professor Raz sets out the following thesis about the justification of authority claims:

> [T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than trying to follow the reasons which apply to him directly.

Id. at 53.

90. Fairness, in the sense defined by DWORKIN, LAW'S EMPIRE, *supra* note 41, at 164-65.

and thus that we respect the standards in question under the auspices of text-based formality.[91]

IX

It is unlikely that the account just given is the full story or the only explanation of the peculiarly formal or text-based way in which we approach pieces of legislation. But it furnishes a glimpse of the opportunities that may open up for jurisprudence when we pose questions about the composition of legislative institutions and take seriously the possibility that law made by an assembly of persons may differ significantly, in concept as well as in quality, from law made by one person.

The argument that I have developed also indicates the possibility of closer ties between jurisprudence and democratic theory than have existed hitherto. Too often, analytical jurisprudence in the common law tradition, with its emphasis on courts and its depiction of the legislature as a disreputable, embarrassing and inconvenient sideshow, contrives to present the political provenance of our laws as a matter unworthy of philosophical notice. The impression we are given is that the question of provenance goes to the political credentials of the legislator, which may in turn determine the substantive content of legislation; but provenance appears largely irrelevant to the status of legislation as law or to the conception of law—as, for example, a general rule, a moral principle, or an interpretable text—which legislation exhibits. In the last analysis, that impression *may* be correct; that is, it *may* be the case that we can do all the philosophical and conceptual thinking that we need to do about law while ignoring the issue of who makes law and on what authority. But it is not something we are entitled to assume a priori. It is surely worth exploring the possibility that the nature of law reflects the conditions under which it is made. A legal system which vests final authority in an assembly comprising hundreds of representatives—and which does so as a way of expressing principles of popular sovereignty, self-government and democratic self-determination—may require a somewhat different sort of jurisprudence from that appropriate to a system dominated by the edicts a single, rational law-giver.

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91. A fuller account of this respect would present it not only as a theory of general civic obligation to the legislature, but also as an issue of the respect owed to the legislature specifically by the courts, in the context of democratic legitimacy and the separation of powers.